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CITATIONS.

CASES:

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 598

FREDERIC HENRY, *Petitioner*

v.

GENERAL COURTNEY H. HODGES, Commanding General, First Army, Fort Jay, New York

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On Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

MEMORANDUM FOR THE RESPONDENT.

OPINIONS BELOW

The opinion of the District Court (R. 18-39) is reported at 76 F. Supp. 968. The opinion of the Court of Appeals (R. 47-51) is reported at 171 F. 2d 401.

JURISDICTION

The judgment of the Court of Appeals was entered on November 29, 1948 (R. 51), and a petition

for rehearing (R. 53-71) was denied on December 16, 1948 (R. 72). The petition for a writ of certiorari was filed on February 25, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Following an investigation of an alleged misappropriation of silver bullion, conducted on orders of superior authority, an officer filed a report in which he stated that petitioner appeared to be the principal guilty party. Formal charges were thereafter preferred against the petitioner accusing him of embezzling the silver. The first question presented is whether the officer who conducted the preliminary investigation and filed the report was ineligible, due to lack of impartiality, to conduct the "thorough and impartial" investigation of these charges which the second paragraph of Article of War 70[1] directs shall be made before such charges may be referred to a general court-martial for trial.

2. Whether, assuming such ineligibility and consequent failure to comply substantially with this provision of AW 70, the failure to comply was a fatal jurisdictional error which invalidated the subsequent court-martial trial and conviction.

3. Whether the determination by the military authority appointing a general court-martial, in

[1] Now AW 46b. See footnote 2, *infra*.

detailing as law member thereof an officer not in the Judge Advocate General's Department, that an officer of that Department was "not available for the purpose" within Article of War 8, is subject to collateral attack on habeas corpus.

STATUTES INVOLVED

The second paragraph of the 70th Article of War (10 U.S.C., 1946 ed., 1542) provided at all times relevant hereto as follows:[2]

> No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

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[2] This paragraph has, as of February 1, 1949, been amended and renumbered as AW 46b. Act of June 24, 1948, c. 625 (Public Law 759, 80th Cong.), Title II, §§ 222, 231, 244. Inasmuch as the paragraph is referred to throughout the record as being part of "AW 70," we shall continue to refer to it as AW 70.

The second paragraph of the 8th Article of War (10 U.S.C., 1946 ed., 1479) provided at all times relevant hereto as follows:

> The authority appointing a general court martial shall detail as one of the members thereof a law member, who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member. The law member, in addition to his duties as a member, shall perform such other duties as the President may by regulations prescribe.

STATEMENT

On June 4, 1947, petitioner, a captain in the United States Army, was convicted in Germany by an Army general court-martial of embezzling silver bullion, in violation of the 93d Article of War (10 U.S.C., 1946 ed., 1565), and was sentenced to dismissal from the service, total forfeitures, and three years' confinement at hard labor (CM R. 109, 257, 263, 264).[3] After review of the record by the Staff Judge Advocate (CM R. 25-30;

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[3] "CM R." refers herein to the court-martial record which was admitted in evidence at the habeas corpus proceeding pursuant to stipulation (R. 17, 44). Page references to this record are to the pencilled numbering at the lower right-hand corner of each page. Photostatic copies of the court-martial record have been filed with the Clerk of this Court.

see AW 46 (10 U.S.C., 1946 ed., 1517)), the convening authority approved the sentence and forwarded it for confirmation (CM R. 265).

Thereafter, pursuant to AW 50½ (10 U.S.C., 1946 ed., 1522), the record was reexamined by a Board of Review in the Judge Advocate General's Office. The Board rendered an opinion (CM R. 3-16) holding that the evidence was insufficient to establish that the accused had been entrusted with the silver, or had any appreciable degree of responsibility for or control over it, and that, accordingly, he was not on the evidence of record guilty of embezzlement. The Board therefore held that "the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specification as include findings of guilty of fraudulent conversion to accused's own use * * *, in violation of the 96th Article of War," and legally sufficient to support the sentence (CM R. 16).[4]

The Judge Advocate General concurred in the holding of the Board of Review, and recommended that the period of confinement be reduced to six months, but that otherwise the sentence be confirmed (CM R. 1-2). On December 18, 1947, the Secretary of the Army, acting under AW 48 (10

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[4] One member of the Board of Review dissented on the ground that, in his opinion, fraudulent conversion is not a lesser offense included within the charge of embezzlement (CM R. 17-18).

U.S.C., 1946 ed., 1519) and Executive Order No. 9556 of May 26, 1945 (10 F.R. 6151), approved only so much of the findings as had been held legally sufficient, reduced the period of confinement to one year, confirmed the sentence as thus reduced, and designated a branch of the United States Disciplinary Barracks as the place of confinement (CM R. 19-20).

On February 19, 1948, petitioner filed in the District Court for the Southern District of New York a petition for a writ of habeas corpus (R. 5-9), which gave rise to the present proceeding. The petition challenged the jurisdiction of the court-martial on two separate grounds. The first ground was that AW 70, paragraph 2 (*supra,* p. 3), providing that "No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made," had not been complied with, in that Captain Meyers, the pre-trial investigating officer, had, prior to his appointment as such officer, "made a special investigation and report to the Commanding Officer of the 3rd Military Government Regiment in which he reported that your petitioner was the main figure in taking silver, and it was upon this report of Capt. Ira R. Meyers that charges were filed against your petitioner," and that consequently Captain Meyers "was prejudiced and was unable to make a fair and impartial" investigation as required by AW 70, paragraph 2

(R. 7).[5] The second ground was that AW 8, paragraph 2 (*supra*, p. 4), had not been complied with, in that the law member of the court-martial was not an officer of the Judge Advocate General's Department, although, allegedly, "at least two members of the Judge Advocate General's Department were available" for appointment to the court as law member (R. 8).[6]

The writ issued (R. 3-4) and a return was filed (R. 10-16). By stipulation (R. 17), it was agreed that the petition for the writ, the writ, the return to the writ, and the court-martial record should constitute the entire record in the habeas corpus proceeding. On March 29 and 31, 1948, respectively, the District Court (Ryan, D. J.) entered an opinion (R. 18-39) and order (R. 40-41) sustaining the writ and directing petitioner's discharge from custody.[6a] In its opinion, the Dis-

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[5] The petition also alleged that AW 70 had been violated in that Captain Meyers, in conducting the AW 70 investigation, did not permit petitioner to call certain witnesses he desired (R. 7). This was denied by Captain Meyers during the court-martial proceedings (CM R. 120-122), however, and the court-martial specifically resolved this issue against petitioner (CM R. 127-128). The District Court declined to relitigate the issue (R. 34-36), and it was abandoned on appeal to the Court of Appeals (R. 50).

[6] Both these grounds were also urged, unsuccessfully, in the course of the court-martial proceedings in special pleas to the jurisdiction of the court (CM R. 105-108, 111-127).

[6a] Petitioner had but three days of his sentence left to serve when he was ordered discharged (R. 56, 69; Pet. 12). The order of discharge directed that petitioner be released "upon

trict Court rejected petitioner's contention that the court-martial trial and conviction were void for failure to comply with AW 8 (R. 36-38), stating that that Article "is clearly directory to the officer appointing the court" and that "Whether or not the Judge Advocate General's Department officer is available as a law member is unquestionably a matter, which lies for determination, in the sound discretion of the officer who appoints the court-martial" (R. 38). The court held, however, that compliance with AW 70 is a jurisdictional prerequisite to a valid trial and conviction by an Army general court-martial (R. 25-32) and that it had not been substantially complied with in this case (R. 22-25, 38-39).

On appeal by respondent to the Court of Appeals for the Second Circuit, the judgment of the District Court was reversed and the writ ordered dismissed (R. 51). The Court of Appeals assumed, *arguendo,* that substantial compliance with AW 70 is a jurisdictional prerequisite to a valid general court-martial trial (R. 47-48), but held that there had been substantial compliance in this case (R. 48-50). The Court of Appeals also re-

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his personal recognizance and [turned] * * * over to the custody of his attorneys * * * pending the determination of any appeal which may be taken from this order * * *" (R. 40-41). The mandate of the Court of Appeals, reversing the order of the District Court and directing dismissal of the writ of habeas corpus (R. 51), has been stayed pending disposition by this Court of the petition for a writ of certiorari (R. 72-73).

jected the contention that the court-martial was illegally constituted for failure to comply with AW 8 (R. 50-51).

The relevant facts may be summarized as follows:

With respect to AW 70.—Captain Ira Meyers had been designated by the Commanding Officer of Company D, 3d Military Government Regiment, to investigate an alleged misappropriation of silver plate by Military Government officers in Waldmunchen, Germany, in January 1946. After interviewing numerous witnesses, he submitted a report on October 10, 1946 (CM R. 38-45), to which were attached 11 enclosures and sub-enclosures (CM R. 46-80), and in which he stated, among his "Conclusions" (CM R. 43-45), that "Silver plate was illegally cut and taken in Jan 46 by several MG Officers" and that "Capt. Henry appears to be the main figure in the affair, although it is apparent that Lt. Felman shared to a great extent in the spoils" (CM R. 44).

Thereafter, on October 24, 1946, the charges on which petitioner was subsequently tried were preferred against petitioner by Lieutenant Colonel Hastings (CM R. 31-33), the Commanding Officer of Company D, who had ordered the investigation (CM R. 121, 246). Captain Meyers was detailed to investigate these charges pursuant to AW 70 by the regimental commander (CM R. 121, 123). On October 29, 1946, Meyers submitted his "Pre-

trial Investigating Officer's Report" (CM R. 35-37), in which he recommended that petitioner be tried by general court-martial. Meyers attached to his report (see CM R. 35, 37) numerous exhibits (CM R. 38-85), including, as Exhibit A (CM R. 38-45), the report of his own earlier investigation which he had conducted prior to the filing of charges. He supplemented this October 29 report with a second report, dated October 31 (CM R. 295-297).

Meyers' pre-trial investigation report was thereafter reviewed at Headquarters, 3rd Military Government Regiment (CM R. 86-87). The regimental commander also recommended trial by general court-martial (CM R. 88), as did the Staff Judge Advocate of the Commanding General, Third Army, who reviewed the charges and accompanying papers pursuant to AW 70, paragraph 3 (10 U.S.C., 1946 ed., 1542) and MCM, 1928 ed., §35*b* (CM R. 89). The charges were thereupon referred for trial by order of the Commanding General, Third Army (CM R. 33), and, in due course,[7] were referred for trial to a general court-martial appointed by the Commanding General, United States Constabulary (CM R. 96).

With respect to AW 8.—The court-martial, as originally appointed on May 16, 1947 (CM R. 96),

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[7] Trial was delayed to permit the taking of depositions (CM R. 94). In the meantime, the Third Army was returned to the United States.

included Colonel Darling, Cavalry, as president and law member, and Lieutenant Colonel Mosely, Infantry, Legal Division, OMGB, as the regularly appointed defense counsel for both petitioner and Lieutenant Felman (see p. 9, *supra*), whose common trial with petitioner had previously been authorized by the appointing authority (CM R. 266). When the court-martial first convened, on May 21, 1947, Lieutenant Colonel Mosely asked to be relieved as defense counsel, stating that he felt "morally disqualified" on the ground that, as "legal officer assigned to this detachment," he had previously recommended that charges be preferred against both accused (CM R. 93). Both accused then requested individual counsel of their own selection (see AW 17 (10 U.S.C., 1946 ed., 1488); MCM, 1928 ed., §45*a*), petitioner asking for William H. Mondell, a civilian employee of the United States, and Felman for one Captain McCleod (CM R. 94). The court-martial thereupon adjourned until a decision could be had as to the availability of the individuals requested as counsel (CM R. 95).

In an order dated the same day, May 21, the appointing authority relieved Lieutenant Colonel Mosely as defense counsel and detailed Lieutenant Colonel Beatty, Judge Advocate General's Department, as defense counsel in his stead (CM R. 97). In another order, dated May 24, the appointing authority detailed 2d Lieutenant Swan, also of the

Judge Advocate General's Department, as assistant trial judge advocate (CM R. 98).

The court-martial reconvened on May 28, 1947, Beatty and Swan being present in their respective capacities (CM R. 99). At this time, Mr. Mondell, petitioner's choice as his individual counsel, was also present and petitioner introduced him to the court (CM R. 100-101). Felman advised the court that his choice for individual counsel, Captain McCleod, was not yet present, but that for the time being he was willing to be represented only by Lieutenant Colonel Beatty, the defense counsel appointed for both accused (CM R. 101-104).

Thereupon, petitioner's individual counsel, Mondell, challenged Colonel Darling "for cause, as law member but not as president," on the ground that he was not a member of the Judge Advocate General's Department although "the appointing authority did have available to it a fully qualified member of the Judge Advocate Section [*i.e.*, Lieutenant Colonel Beatty], who was not appointed on this court originally but brought in subsequently as a substitute for the regularly appointed defense counsel" (CM R. 105). Mondell stated that his challenge of Colonel Darling had "nothing to do with Colonel Darling's qualifications as law member," but was based solely on the fact that AW 8 provided that the appointing authority should detail, as law member, an officer of the Judge Advocate General's Department if such an officer was available (*ibid.*). The prosecution

opposed the challenge on the ground that the availability or non-availability of an officer of the Judge Advocate General's Department for appointment as law member was "a matter within the discretion of the appointing authority" (CM R. 105-106). After hearing argument, the court overruled the challenge (CM R. 107-108).[8] Thereafter the same objection was raised in a special plea to the jurisdiction of the court (see MCM, 1928 ed., §§ 7, 65), and overruled (CM R. 111).

After argument on various other motions and pleas (CM R. 111-132), including a plea to the jurisdiction of the court on the ground that AW 70 had not been complied with (CM R. 111-128), petitioner entered pleas of not guilty to the charges and specifications (CM R. 132). Also, Lieutenant Colonel Beatty asked for a severance for Felman, which was granted (CM R. 134; see MCM, 1928 ed., §71*b*). The trial thereupon continued as to petitioner alone (CM R. 134-135, *et seq.*). While the court-martial record does not clearly indicate the fact, it appears that Beatty, the defense counsel appointed to represent both accused, continued to represent petitioner as co-counsel with Mondell, his specially retained counsel. See CM R. 264, where both Beatty and Mondell signed the "Authentication of Record" as "defense counsel" and "special defense counsel," respectively.

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[8] Challenges are provided for in AW 18 (10 U. S. C., 1946 ed., 1489), and the procedure in connection therewith is prescribed by MCM, 1928 ed., § 58*f*.

The court-martial's rulings on petitioner's challenge of Colonel Darling for cause and his plea to the jurisdiction of the court on the ground of failure to comply with AW 8 were held correct on review both by the Staff Judge Advocate (CM R. 28) and the Board of Review (CM R. 10-11). The petition for a writ of habeas corpus (R. 5-9) made no objection as such to any ruling by Colonel Darling as law member.

ARGUMENT

1-2. In *Smith* v. *Hiatt,* 170 F. 2d 61, now pending on writ of certiorari *sub nom. Humphrey* v. *Smith,* No. 457, the Court of Appeals for the Third Circuit held that substantial compliance with AW 70 is a jurisdictional prerequisite to a valid trial and conviction by general court-martial, and that that Article had not been substantially complied with in that case. Three reasons were assigned why there had not been substantial compliance, the principal one being that the pre-trial investigating officer, Lieutenant Todd, was ineligible to conduct the thorough *and impartial* investigation directed by the Article because of the fact that he had previously participated to a limited extent in the preliminary investigation which led to the charges, including the conduct of an identification line-up at which the accused was identified as the guilty person.

In the instant case, the Court of Appeals for the Second Circuit held that Captain Meyers was not

precluded from conducting the impartial pre-trial investigation called for by AW 70 by reason of the fact that he had conducted the entire pre-charge investigation (*supra*, p. 9) of the offense that was subsequently charged and re-investigated pursuant to AW 70. The court below did not decide the jurisdictional question, but assumed, *arguendo*, that substantial compliance with AW 70 conditions the jurisdiction of the court-martial.

The *Smith* case, we understand, will have been argued before the Court passes upon the petition for certiorari in this case. Accordingly, we suggest that the Court reserve decision on the petition herein until the *Smith* case is decided, and then enter in this case whatever order seems appropriate in the light of that decision.

It should be observed that, in the petition for certiorari, there is neither a showing nor an attempt to show that the conduct of the AW 70 investigation by Captain Meyers "injuriously affected the substantial rights" of the petitioner. Congress has provided in AW 37 (10 U.S.C., 1946 ed, 1508):

> The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved, in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall ap-

> pear that the error complained of has injuriously affected the substantial rights of an accused * * *.

Thus, even assuming that compliance with AW 70 is a condition precedent to the jurisdiction of a general court-martial, it is clear that a court-martial is deprived of jurisdiction only where there has been such non-compliance with AW 70 as has "injuriously affected the substantial rights of an accused". Here, the petitioner, after trial and conviction by a general court-martial, only complains that if an officer other than Captain Meyers had made the AW 70 investigation he might not have recommended trial by general court-martial. This is not enough under AW 37.

3. We submit that certiorari should be denied with respect to the question raised under AW 8. The District Court rejected petitioner's contention that the general court-martial which tried him was illegally constituted because, while two officers of the Judge Advocate General's Department were physically available, an officer of another branch of the service was detailed as law member; the court held that the determination of the appointing authority as to availability was final, and not subject to review, citing *Martin* v. *Mott*, 12 Wheat. 19, 34-35 (R. 38). Petitioner renewed his contention on this point in the Court of Appeals, which upheld the District Court in this respect (R. 50-51). We submit that the determination by both courts below on this issue is correct.

The language of the statute which requires the detail of a law member, AW 8 (*supra*, p. 4), confers a broad discretion on the appointing authority. He must detail a law member—

> who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specifically qualified to perform the duties of law member. * * * .

The statute reads, "available for the purpose," not merely "available." Consequently, as the Judge Advocate General has held, AW 8 "imports not only the narrow concept of physical accessibility, but also the broader concept of discretion in the determination of the suitability of the person." CM 231963, *Hatteberg*, 13 B.R. 349, 368 (1943), summarized in 2 Bull. JAG, p. 304, §365(9); Cf. CM ETO 804, *Ogletree*, 2 B.R. (ETO) 337 (1943), summarized in 2 Bull. JAG, p. 466, §365(9); CM 209988, *Cromwell*, 9 B.R. 169, 196 (1938); see Board of Review's discussion of this point in this case, CM R. 10-11; Dig. Op. JAG (1912-1940), §365(9)(6), p. 176. The exercise of a discretion so broad in its terms, this Court has consistently held, will not be reviewed by the courts. *Martin* v. *Mott*, 12 Wheat. 19, 34-35; *Mullan* v. *United States*, 140 U.S. 240, 243-245; *Swaim* v. *United States*, 165 U.S. 553, 559-560.

In *Martin* v. *Mott, supra,* reliance was placed on AW 64 of 1806 (Act of April 10, 1806, c. 20, 2 Stat. 359, 367) which provided that:

> General courts martial may consist of any number of commissioned officers, from five to thirteen, inclusively; but they shall not consist of less than thirteen where that number can be convened without manifest injury to the service.

It was contended that the court-martial was not composed of the proper number of officers required by law. But the Court held, *per* Story J. (12 Wheat., at 35), "that the act is merely directory to the officer appointing the court, and that his decision as to the number which can be convened without manifest injury to the service, being in a matter submitted to his sound discretion, must be conclusive."

Similarly, in *Mullan* v. *United States, supra,* the statutory provision in question was Article for the Government of the Navy 39 of 1862 (R. S. 1624), reading in pertinent part as follows:

> A general court martial shall consist of not more than thirteen nor less than five commissioned officers as members; and as many officers, not exceeding thirteen, as can be convened without injury to the service, shall be summoned on every such court. But in no case where it can be avoided without injury to the service, shall more than one-half, exclusive of the President, be junior to the officer to be tried. * * * .

Mullan, an officer in the Navy, was tried on board a naval vessel at Hong Kong by a court-martial of seven officers, five of whom were junior to him. He established that at the time of the organization of the court-martial there were twelve more officers of higher rank than he, on waiting orders in the City of Washington, and that, at about the same time, seven officers had been sent from New York to Panama for the trial of a medical officer there, in view of the fact that in the squadron at Panama there was not the requisite number of officers of sufficient rank to organize the court for that trial.

This Court held, on the authority of *Martin* v. *Mott,* that the judgment of the appointing authority could not be collaterally attacked, saying (140 U.S., at 245):

> * * * Whether the interests of the service admitted of a postponement of his trial until a court could be organized of which at least one-half of its members, exclusive of the President, would be his seniors in rank, or whether the interests of the service required a prompt trial, upon the charges preferred, by such officers as could be then assigned to that duty by the commander-in-chief of the squadron, were matters committed by the statute to the determination of that officer. And the courts must assume—nothing to the contrary appearing upon the face of the order convening the court—that the discretion conferred upon him was properly exercised, and, therefore, that

> the trial of the appellant by a court, the majority of whom were his juniors in rank, could not be avoided "without injury to the service." "Whenever," this court said in *Martin* v. *Mott,* 12 Wheat. 19, 31, "a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts."

An analogous situation was presented in *Swaim* v. *United States, supra.* AW 79 of 1874 (R.S. 1342) provided that—

> Officers shall be tried only by general courts-martial; and no officer shall, when it can be avoided, be tried by officers inferior to him in rank.

Swaim, a brigadier general, was tried by a court-martial composed of 11 officers, of whom 6 were only colonels, at a time when there were, exclusive of himself, nineteen general officers in the Army (28 C. Cls. 173, 184, 202); and he accordingly contended that the court-martial was illegally constituted. But this Court held that the discretion of the President, who had convened the court-martial, could not be collaterally attacked. It said (165 U.S., at 560):

> In the present case, several considerations might have determined the selection of the members of the court, such as the health of the officers within convenient distance, or the

> injury to the public interests by detaching officers from their stations. The presumption must be that the President, in detailing the officers named to compose the court-martial, acted in pursuance of law. The sentence cannot be collaterally attacked by going into an inquiry whether the trial by officers inferior in rank to the accused was or was not avoidable.

The same considerations, we submit, are controlling here. There may have been the very best of reasons why the appointing authority considered the two officers of the Judge Advocate General's Department "not available for the purpose." Certainly it cannot be said that 2d Lieutenant Swan, JAGD, was more qualified to perform the duties of law member than was Colonel Darling, the latter an officer of over twenty years' commissioned service.[9] Significantly, in the argument concerning the alleged ineligibility of Colonel Darling as law member, it was never suggested that Swan, who was present at the time as assistant trial judge advocate, should have been made law member rather than Darling (*supra,* p. 12). With respect to Lieutenant Colonel Beatty, JAGD, there is nothing in the record to show that he was available for appointment as law member on May 16, 1947, the date when the court-martial was appointed (CM R. 96). He was, it is true, available, in the sense of "physically accessible,"

[9] 1 Official Army and Air Force Register (1948), p. 423.

on May 21, 1947, when he was appointed as defense counsel for both petitioner and Felman in lieu of Lieutenant Colonel Mosely, who had asked to be relieved on the ground of disqualification (*supra*, p. 11). But as between providing the accused with Beatty's services as a lawyer and placing him on the court, considerations of justice may well have dictated the former course. As the Board of Review said (CM R. 11), "the appointment of an officer of the Judge Advocate General's Department as defense counsel, instead of as law member, may, in a case of this nature, reasonably be considered a wise exercise of discretion by the appointing authority and a concession in the benefit of the accused." The fact that petitioner had a personally retained attorney on hand to represent him when the court-martial reconvened on May 28, 1947, did not mean that Beatty's services as defense counsel were no longer required. On the contrary his services were specifically requested by the codefendant, Felman, until such time as Felman's choice for counsel, Captain McCleod, could be present, and Beatty in fact continued to represent Felman until the severance was granted. Indeed, as we have indicated (*supra*, p. 13), while the record is not clear on the matter, it appears that even after Felman was granted a severance, Beatty continued on as co-counsel with Mondell, petitioner's special attorney.

Other considerations which may have influenced the appointing authority in his decision not to

place 2d Lieutenant Swan or Lieutenant Colonel Beatty on the court as law member might be mentioned.[10] But it is unnecessary to speculate on these matters. The statute commits the discretion to the appointing authority, and the decisions cited make it plain that this discretion may not be collaterally reviewed.[11]

CONCLUSION

For the reasons stated, we oppose the granting of the petition for certiorari with respect to the third question presented (petitioner's second question presented),[12] and suggest that as to the first

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[10] Not every officer of the Judge Advocate General's Department is, *virtute officii*, qualified to rule on questions of evidence arising in the course of a trial; there are many lawyers even in civil life, of eminence and ability, whose talents do not lie in that direction.

[11] A recent district court decision, *Brown* v. *Hiatt*, 81 F. Supp. 647 (N. D. Ga.), decided November 17, 1948, is contrary to the decisions of both courts below in respect of the AW 8 issue. There, a court-martial sentence was declared void on habeas corpus on the sole ground that the law member was not an officer of the Judge Advocate General's Department, it appearing from the record that an officer of that Department was "available" in that he was detailed at the trial as assistant trial judge advocate. For the reasons given in the text, we believe the decision erroneous and have appealed it to the Court of Appeals for the Fifth Circuit.

[12] Our question 1 is substantially the same as petitioner's question 1 (Pet. 3). The petition does not expressly recognize our question 2 (the jurisdictional question with respect to AW 70) as a "question presented."

two questions the Court enter an appropriate order in the light of the decision to be reached in *Humphrey* v. *Smith*, No. 457.

Respectfully submitted.

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